



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-141

June 6, 2016

The Honorable R. Trevor Drown
State Representative
P. O. Box 1182
Dover, AR 72837-1182

Dear Representative Drown:

You have requested my opinion on the following question:

Did [the City of] Fairfield Bay violate Arkansas law by awarding volunteer EMS members a \$25 gift card service recognition award?

The attachment to your correspondence indicates that this question was prompted by a particular finding by the State Division of Legislative Audit. The auditor noted the city's expenditure of "\$1,375 for Christmas Gift Cards."¹ The auditor's finding stated that the expenditure "could possibly conflict with the 'public purpose' doctrine" [citing a previous Attorney General Opinion] and art. 12, § 5 of the Arkansas Constitution. As further background for the above question, you state:

A constituent has been asked to sign [an audit] finding that states that Fairfield Bay violated Arkansas law by awarding volunteer EMS [emergency medical services] members a \$25 gift card service recognition award at last year's Christmas party. The volunteer EMS program is being recognized as one of the 12 volunteer communities of the year at the [Arkansas Municipal League] conference in December.

¹ An additional finding was noted on the auditor's report. This additional finding was not referenced in your request for my opinion and will not be addressed herein.

Everyone receiving a service award gave more than 1,000 hours of volunteer labor to the political subdivision. This was considered exceptional service, worthy of a \$25 service recognition gift card. It is necessary and appropriate to ensure a receptive climate to attract citizen volunteers for the awardees and the sacrifices of their spouses. The amount given does not rise to the \$100 level necessary to be classified as a gift by the state in Ark. Code Ann. § 21-8-402(5)(B)(b)(vii)(a). The term “gift” does not include: Anything with a value of one hundred dollars or less.

This program gets more than one million dollars in volunteer effort each year, in a town of 2,338 citizens. The EMS volunteer program staffs two ambulances, 24 hours per day, 365 days a year with crews of three, which equates to approximately 52,560 hours.

Additionally, the City is not obtaining or appropriating money or loaning money to any corporation, association, institution, or individual.

RESPONSE

The limited facts before me seem to indicate that the gift cards amounted to a donation to private individuals, contrary to Article 12, section 5 of the Arkansas Constitution. I must emphasize, however, that the question whether a particular municipal expenditure violates this constitutional prohibition can be highly fact-intensive. I do not know how much fact-finding was undertaken by the auditor in this case, but the facts before me suggest that a thorough inquiry into the precise relationship between the EMS program (and by extension the recipients of the gift cards) and the City could be critical to definitively determining whether the gift cards were a prohibited donation. I cannot undertake that inquiry in the context of issuing an Attorney General opinion. While I consequently cannot definitively answer your question, I can discuss what I believe is the appropriate legal analysis based on the facts before me.

DISCUSSION

The Arkansas Constitution clearly imposes restrictions on a municipality's expenditure of public funds. Article 12, section 5, specifically precludes a city from obtaining or appropriating money for any corporation, association, or

individual.² As interpreted by the Arkansas Supreme Court, this constitutional provision bars all donations by municipalities to any private entity or person, regardless of whether the donation might serve a public purpose.³ It forecloses direct cash donations, as well as other municipal expenditures that amount to granting financial aid, i.e., donating to a private individual or entity.⁴

Additionally, the overall “public purpose” doctrine precludes the expenditure of public funds for reasons other than a public purpose. The doctrine is a common law constitutional doctrine.⁵ Any use of municipal funds in derogation of art. 12, § 5 or the “public purpose” doctrine would invite challenge under Article 16, section 13 to the Arkansas Constitution. This constitutional provision authorizes citizens to institute suit to protect inhabitants from the enforcement of “illegal exactions” (the “misapplication of public funds”).⁶

² Ark. Const. art. 12, § 5 (“No county, city, town or other municipal corporation shall become a stockholder in any company, association or corporation; or obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual.”).

³ See *City of Jacksonville v. Venhaus*, 302 Ark. 204, 788 S.W.2d 478 (1990) (reversing chancellor’s distribution of residual common-fund proceeds to various private, nonprofit charities and directing that the funds be returned to the municipalities to be used for “general municipal services.”); *Halbert v. Helena-West Helena Indus. Dev. Corp.*, 226 Ark. 620, 291 S.W.2d 802 (1956) (striking down, under art. 12, § 5, state legislation that permitted a city, town, or county to purchase membership in a local industrial development corporation).

⁴ *Halbert*, 226 Ark. at 625, 291 S.W.2d at 806 (holding that the city could not constitutionally purchase membership in a private, nonprofit corporation because it would be doing indirectly what art. 12, § 5 forbids be done directly, i.e., granting financial aid to the corporation). *Accord* Ops. Att’y Gen. 2015-005; 2012-138; 2010-114; 2007-153; 2001-364; 94-317. See also Op. Att’y Gen. 91-410 (cited by the auditor in this case.)

⁵ See *Chandler v. Board of Trustees*, 236 Ark. 256, 258, 365 S.W.2d 447, 448 (1963) (“No principle of constitutional law is more fundamental or more firmly established than the rule that the State cannot, within the limits of due process, appropriate public funds to a private purpose.”).

⁶ See, e.g., *Pledger v. Featherlite Precast Corp.*, 308 Ark. 124, 128, 823 S.W.2d 852, 855 (1992) (stating that “illegal exaction” cases can take two forms: 1) the illegal tax case, and 2) the misapplication of public funds case, or simply “the public funds case,” which the Court gives an expansive interpretation “because taxpayers are the equitable owners of all funds collected by a government and, in most of the cases, are liable to replenish the funds exhausted by a misapplication or wrongful payment.”).

Article 12, Section 5

Article 12, section 5 clearly bars the gift cards at issue if they amount to a donation. If this constitutional provision bars the expenditure, the analysis ends there. Moreover, the art. 12, § 5 prohibition is not limited strictly to cash donations. It applies with equal force to any expenditure of municipal funds that constitutes financial aid to private entities and individuals.⁷

You state as part of the background information for your question, however, that the City “is not obtaining or appropriating money or loaning money to any corporation, association, institution, or individual.” This suggests a belief that art. 12, § 5 is not implicated in connection with the gift cards. But the basis for that belief is not clear under the facts provided. It may be attributable to a mistaken belief that art. 12, § 5 only applies to actual cash donations.⁸

Based upon the limited facts before me, it is my opinion that art. 12, § 5 must be considered in this case. Moreover, these limited facts point to the conclusion that the gift cards were given as private benefits outside the range of salary and benefits provided to public employees.⁹ But there may be some unresolved issues of fact that potentially bear on the question whether the gift cards were a prohibited donation. For instance, I note some variance between your description of the gift cards and that of the auditor. You refer to the gift cards as “service recognition gift cards,” suggesting perhaps that the cards were an element of consideration paid for services rendered. The auditor described them as “Christmas Gift Cards,” suggesting they were purchased simply to be given out gratuitously as gifts.

I note that you refer to the EMS program staff as “citizen volunteers,” which seems to suggest that the EMS staff members provide gratuitous services to the City. I believe a resolution of the precise nature of the arrangement between the

⁷ See note 4 *supra* and accompanying text.

⁸ See Op. Att’y Gen. 91-410 (opining that public expenditures for items such as flowers, cards and gifts for employees and other persons would run afoul of art. 12, § 5’s prohibition against appropriating funds to individuals).

⁹ I note in this regard that service recognition awards for municipal employees can, as a general proposition, be an element of consideration paid the employees for their services, and thus fall outside the art. 12, § 5 prohibition. See *id.*

City and the EMS program and its staff is important to the art. 12, § 5 analysis and should be resolved by an authorized finder of fact, of which I am not one.

Depending on what facts are adduced from a thorough investigation of this matter—and particularly of the precise nature of the relationship between the City and the EMS program, as mentioned above—the possibility exists that the arrangement between the City and the EMS program or its “volunteers” may be in the nature of a contract for services. The Arkansas Supreme Court has recognized that art. 12, § 5 does not apply to payments under a valid contract.¹⁰ If supported by adequate consideration, a contractual arrangement, even if only an oral one, between the City and the EMS volunteers may well remove the gift card award from the art. 12, § 5 prohibition.¹¹ The auditor, in his findings, refers to the “volunteer *nature* of the Rescue Squad” (emphasis added). This suggests some equivocation as to the precise relationship between the EMS program (and by extension the recipients of the gift cards) and the City. I do not know how much fact-finding the auditor undertook,¹² but I believe a thorough inquiry into that relationship would be critical to definitively answering the question whether the gift cards amounted to a private benefit as opposed to an element of consideration paid for services provided under a valid contract.

Public Purpose Doctrine

If the facts establish that the gift cards are not barred by art. 12, § 5, the payment must still satisfy the common-law “public purpose doctrine.” The determination of whether a particular expenditure is for a “public purpose” is to be made by the legislative body authorizing the expenditure. Although the propriety of a particular expenditure is ultimately resolved by the judiciary, great weight must be given to legislative declarations of public purposes.¹³

¹⁰ *City of Ft. Smith v. Bates*, 260 Ark. 777, 544 S.W.2d 525 (1976).

¹¹ *See, e.g.*, Op. Att’y Gen. 2015-005. As I noted in this opinion, however, the adequacy of consideration under a contract is a fact-intensive issue, as are questions concerning the existence and terms of any oral contract alleged to exist.

¹² *See* Ark. Code Ann. § 10-4-403 (Supp. 2015) (stating the authority of the Legislative Auditor, including the power to subpoena persons and documents).

¹³ *See Turner v. Woodruff*, 286 Ark. 66, 72, 689 S.W.2d 527, 531 (1985).

Further bearing on this point is the legislative authority granted to mayors under Ark. Code Ann. § 14-58-303 (Supp. 2015):

In a city of the first class, city of the second class, or incorporated town, the mayor or the mayor's duly authorized representative shall have exclusive power and responsibility to make purchases of all supplies, apparatus, equipment, materials, and other things requisite for public purposes in and for the city and to make all necessary contracts for work or labor to be done or material or other necessary things to be furnished for the benefit of the city, or in carrying out any work or undertaking of a public nature in the city.

This statute, which would clearly apply to a municipal contract for emergency medical services, is consistent with more general statutes granting municipalities the authority to enter into contracts that relate to municipal affairs. It is without question that emergency medical service to a community is in the public interest and is a benefit to the City. And, as mentioned above, if it is determined that a contractual relationship between the City and its EMS team supported by adequate consideration, there can be little doubt the public purpose doctrine is satisfied.

Conclusion

In sum, the limited facts before me suggest that the gift cards amounted to a donation to private individuals, contrary to a plain reading of art. 12, § 5 of the Arkansas Constitution. I cannot definitively decide that issue because there may be other facts pertinent to the issue. But if upon further investigation and fact-finding it is determined that art. 12, § 5 does *not* prohibit the gift cards, then in my opinion the public purpose doctrine would be satisfied in this case. It is my hope that the foregoing will be of assistance in guiding the legal and factual analysis.

Sincerely,



LESLIE RUTLEDGE
Attorney General